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STATE OF MONTANA,

Plaintiff and Appellee,

v.

MELVIN MATSON,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Fifth Judicial District Court,  
Jefferson County, The Honorable Loren Tucker, Presiding

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## **STATEMENT OF THE ISSUES**

Did district court err in denying Appellant's motion to suppress for lack of particularized suspicion?

## **STATEMENT OF THE CASE**

On August 29, 2008, Melvin Arthur Matson (Matson) was ticketed and charged with driving under the influence (DUI) in violation of Mont. Code Ann. § 61-8-401, and operation of a vehicle with an alcohol concentration of .08 or more in violation of Mont. Code Ann. § 61-8-406, in justice court from a traffic stop that occurred on August 29, 2008. (D.C. Doc. 2, at Copy of Jefferson County Sheriff's Citations #'s C51A19426 and C51A19427.) On October 29, 2008, Matson filed a motion to suppress based on a lack of particularized suspicion. (D.C. Doc. 2 at Mot. to Supp. for Lack of Particularized Suspicion & Supporting Br.) The motion was heard and granted in Justice Court. (D.C. Doc. 2 at Or. Granting Def.'s Mot. to Supp. for Lack of Particularized Suspicion & Or. to Dismiss.)

This is an appeal of a denied motion to suppress evidence gathered after a traffic stop ordered by the Fifth Judicial District Court, Jefferson County. The original motion was heard and granted in justice court. (D.C. Doc. 2 at Or. Granting Def.'s Mot. to Supp. for Lack of Particularized Suspicion & Or. to Dismiss.) The case was dismissed by justice court and the State appealed to the district court. (D.C. Doc 1; 4/15/09 Tr. at 5-6.) The district court held a

suppression hearing and denied Matson's original motion to suppress. (4/15/09 Tr.)

Pursuant to Mont. Code Ann. § 46-12-204(3), Matson entered a conditional guilty plea to an amended charge of DUI Per Se, reserving the right to appeal the denial of his motion to suppress. (D.C. Doc. 19.) Matson now appeals the denial of his motion to suppress by the district court.

### **STATEMENT OF THE FACTS**

These facts are derived from Detective Gleich's (Det. Gleich) report on the incident as stated in Matson's original motion to suppress. (D.C. Doc. 2, at Mot. to Supp. for Lack of Particularized Suspicion & Supporting Br.)

On 08-29-2008, at approximately 1925 hrs. I was driving by RJ's Steakhouse in Clancy located on Legal Tender Way when a large cloud of dust drifting through the air caught my attention. The cloud of dust was coming from the Gruber Excavating storage yard located across from RJ's. As I pulled up to the stop sign, I noticed a dark blue pickup preparing to exit the yard, I am personally familiar with the employees at this location and most of the vehicles they drive. I did not recognize the vehicle or the driver that was exiting.

When I stopped at the stop sign, I motioned to the driver of the blue pickup to enter the roadway. The driver was obviously driving a vehicle with a clutch because the truck lurched forward in a jerking motion when the driver entered the roadway. The driver made two different attempts to pull out onto the roadway. I pulled in behind the vehicle and asked the dispatcher to run a registration check on the truck, which had Montana license plate number: 6C-97110. When pulling away from the stop sign . . . the driver of the vehicle again lurched the vehicle forward suggesting to me he may not be familiar with driving a vehicle with a clutch.

With the recent rash of thefts of scrap metal and vehicle parts in the area, including thefts from Gruber excavating, coupled with the driver's inability to smoothly operate a vehicle with a clutch, suggesting it may not be his vehicle, I conducted a traffic stop . . . to make sure the driver was not involved in any criminal activity on the property belonging to Gruber Excavating."

(D.C. Doc. 1 at 10/29/08 Motion to Suppress.)

Additional facts are provided below where relevant.

### **SUMMARY OF THE ARGUMENT**

The district court erred in denying Matson's motion to suppress evidence of driving under the influence obtained after a traffic stop as Det. Gleich did not possess the requisite particularized suspicion. Neither Matson's driving behavior, the jerking of his vehicle from take-off, nor the location of Matson on a business property open to the public, were sufficient to support a suspicion that he was engaged in any wrongdoing or criminal activity. The district court's findings were clearly erroneous and did not reflect the actual evidence received from the suppression hearing. This Court must reverse the denial of Matson's motion to suppress and dismiss the case against him.

### **STANDARD OF REVIEW**

This Court reviews a district court's decision to deny a motion to suppress to determine whether the court's underlying findings of fact are clearly erroneous and whether the court correctly interpreted and applied the law to those findings. A trial court's findings are clearly erroneous if they are not supported by substantial

credible evidence, if the court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with a definite and firm conviction that a mistake has been made. This Court reviews for clear error a finding that an officer had particularized suspicion to conduct an investigative stop. *State v. Cooper*, 2010 MT 11, ¶ 5, 355 Mont. 80, \_\_\_ P.3d \_\_\_.

### **ARGUMENT**

#### **DETECTIVE GLEICH LACKED PARTICULARIZED SUSPICION TO STOP MATSON’S VEHICLE AND THE INVESTIGATIVE STOP VIOLATED MATSON’S RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE.**

The United States and Montana Constitutions require that searches and seizures be reasonable. U.S. Const. Amend. IV; Mont. Const. Art. II, § 11. These protections apply to investigative stops of vehicles. *Cooper*, ¶ 7; *State v. Gopher*, 193 Mont. 189, 194, 631 P.2d 293, 296 (1981). Montana Code Annotated § 46-5-401(1), grants peace officers the authority to conduct investigatory traffic stops when substantiated by a particularized suspicion. The statute provides in part: A “peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense. . . .” Mont. Code Ann. § 46-5-401(1).

Particularized suspicion requires a showing of objective data from which an officer can make certain reasonable inferences, and a resulting suspicion that the



subject is or has been engaged in wrongdoing. *Cooper*, ¶ 7. Whether an investigative stop is founded upon particularized suspicion is a question of fact that must be evaluated under the totality of the circumstances at the time the stop was initiated. *Cooper*, ¶ 7 (citing *State v. Rutherford*, 2009 MT 154, ¶ 12, 350 Mont. 403, 208 P.3d 389); *State v. Otto*, 2004 MT 338, ¶ 15, 324 Mont. 217, 102 P.3d 522; *State v. Gilder*, 1999 MT 207, ¶ 15, 295 Mont. 483, 985 P.2d 147. When evaluating the totality of the circumstance, a court should consider the quantity or content of the information available to the officer and the quality or degree of reliability of that information. *State v. Graham*, 2007 MT 358, ¶ 15, 340 Mont. 366, 175 P.3d 885; *State v. Elison*, 2000 MT 288, ¶ 16, 302 Mont. 228, 14 P.3d 456.

All warrantless investigative stops are presumed unreasonable, therefore, the State bears the burden of proving the validity of a stop supported by an objective basis for suspecting criminal activity. *State v. Fisher*, 2002 MT 335, ¶ 12, 313 Mont. 274, 60 P.3d 1004 (citation omitted); *Gilder*, ¶ 11; *State v. Reynolds*, 272 Mont. 46, 50, 899 P.2d 540, 543-44 (1995). In *Gopher*, this Court adopted a two-part test to review and determine whether an officer satisfied statutory mandates in initiating a traffic stop. The State must show an officer's alleged particularized suspicion stemmed from: (1) objective data from which an experienced officer can make certain inferences; and (2) resulted in a suspicion that the occupant of a

certain vehicle is or has been engaged in wrongdoing. *Gopher*, 193 Mont. at 194, 631 P.2d at 296.

If a traffic stop is found to have violated a defendant's constitutional rights, all evidence obtained as a result of that stop must be excluded or suppressed as the "fruit of the poisonous tree." *Wong Sun v. U.S.*, 371 U.S. 471, 485-86 (1963) (any evidence acquired by law enforcement as a direct result of an illegal search and seizure must be suppressed).

Detective Gleich's stop of Matson's vehicle was not substantiated by the requisite particularized suspicion. At the time he initiated the stop, there was no objective data from which he or any reasonable law enforcement officer could infer or suspect that Matson was engaged in any criminal activity or wrongdoing.

Gruber Excavation has three locations. A yard on the north end of Montana City on Jackson Creek Road which stores heavy equipment. (4/15/09 Tr. at 13, 38.) A location on Bitterroot in Montana City which had a business office and complex. (4/15/09 Tr. at 38.) The third location, where the traffic stop occurred, contains material storage and is located in Clancy. (4/15/09 Tr. at 38.) The Clancy location advertises topsoil, granite, sand, and manure. The sign at the Clancy location also notes "Saturday deliveries." (D.C. Doc. 1, 11/21/08 Reply Br. in Support of Mot. to Supp. for Lack of Particularized Suspicion, at Ex. A.) A simple post and wire gate is used to close the premises when not in use. However, by

admission of Det. Gleich and the owner, the gate is not always placed across the entrance. The business property also does not have posted signs notifying the public it is private property and/or not to trespass. (4/15/09 Tr. at 22, 24, 31, 42-44.)

When Det. Gleich is not working in his official capacity as a Detective for Jefferson County he builds homes and has conducted business with Gruber Excavation. (4/15/09 Tr. at 10.) Det. Gleich stated he knew the employees of Gruber Excavation and the cars they drove along with the corresponding license plate county leaders (i.e. "51" or "5"). (4/15/09 Tr. at 10, 13.)

Prior to this incident, Gruber's owner had informed Det. Gleich, in an official capacity, that his business had been the victim of two crimes. (4/15/09 Tr. at 13.) The first crime occurred at Gruber's business office, where the door had been kicked in. The second crime involved stolen scrap metal from the Jackson Creek storage yard. (4/15/09 Tr. at 38-39.) Gruber requested extra patrols of his business. (4/15/09 Tr. at 14, 40.)

Det. Gleich testified at the suppression hearing that on August 29, 2008, at approximately 7:25 p.m., he viewed a cloud of dust in the Gruber Excavating yard located in Clancy, Montana. (4/15/09 Tr. at 9.) Upon driving to the yard he saw Matson's vehicle at the exit of the yard preparing to leave. (4/15/09 Tr. at 12-13.) He signaled Matson to leave the yard and observed Matson's vehicle jerked, as if

the clutch was slipping. (4/15/09 Tr. at 15, 28, 29.) Det. Gleich followed Matson, noted a “6C” license plate, and called in a registration check. Det. Gleich learned the vehicle was not reported stolen. (4/15/09 Tr. at 26.)

Det. Gleich testified scrap metal and diesel fuel prices were high and thefts were occurring “out of Bozeman, because the thefts are out of Bozeman, I know these guys are stealing these scrap iron things, and they’re taking them to out of town locations, i.e. Bozeman, Great Falls, and Butte, to scrap the iron. (4/15/09 Tr. at 16.) The district court asked Det. Gleich to clarify his statement regarding his knowledge that the previous thefts used vehicles with a “6C” license plate. (4/15/09 Tr. at 19.) Det. Gleich responded that he did not know a “6C” vehicle was ever involved in a theft; and that the solved crime involved “1C” county license plates. This was the first time Gleich had encountered “6C” county, but the importance to him was that it was not a “51” or “5” plate. (4/15/09 Tr. at 19.)

After Matson left the property he came to a stop sign and made a complete stop. Matson then used his indicator to signal a left turn and while turning the vehicle made another jerky motion. (4/15/09 Tr. at 16.) As soon as Matson turned left, Det. Gleich activated his emergency lights and initiated a traffic stop. (4/15/09 Tr. at 16-17.) The purpose of the traffic stop was “to investigate why [Matson] was coming out of the Gruber Excavating yard, and why he appeared to be nervous.” (4/15/09 Tr. at 17.)

Det. Gleich explained that the way Matson operated his vehicle appeared nervous to him, “the way he - - I drive a vehicle with a clutch, but it doesn’t jerk around like that. And everything was articulate. The blinkers and everything was just in line.” Det. Gleich explained that, in his experience, “blinkers aren’t a big thing to people[,]” sometimes they are used and sometimes they aren’t.

Gleich: But after I pulled in behind Mr. Matson, it appeared that everything was right. He proceeded at a slow pace, and he used his blinker when he was supposed to, and he didn’t do a rolling stop. Everything was just so you don’t get stopped by the police. He was doing what he’s supposed to.

Court: So you’re saying that, ironically enough, proper conduct indicates improper motive.

Gleich: I wouldn’t say that it indicates it, but it certainly raised my suspicion because, you know, the vast majority of people don’t do all these things.

(4/15/09 Tr. at 17-18.)

Matson’s alleged “nervousness” is easily explained. While Matson is on the open business property Det. Gleich approached the property and remained outside. Det. Gleich stopped his vehicle and then *signaled* Matson to leave the yard. It is understandable Matson might appear nervous if a police officer is telling him to leave a business property (which is open to the public), and is waiting for him to do so, then has trouble engaging the truck into first gear causing it to lurch. Det. Gleich then followed Matson and after coming to a complete stop, he accelerated into a left turn and the vehicle jerk’s a second time. “[M]any law-abiding citizens

may well be nervous when their activities are being watched by law enforcement officers.” *State v. Broken Rope*, 278 Mont. 427, 432, 925 P.2d 1157, 1160 (1996).

Much of the existing case law regarding nervous behavior contains facts when officers have approached the vehicle and are in contact its occupants or actions visible to the officer from his patrol car. *State v. Hurlbert*, 2009 MT 221, ¶ 8, 351 Mont. 316, 211 P.3d 869 (defendant was nervous, shaking, sweating, very uneasy, and constantly moving around); *State v. Hilgendorf*, 2009 MT 158, ¶¶ 5-6, 350 Mont. 412, 208 P.3d 401 (while vehicle driving, occupants moved around inside as if trying to conceal something; after stopping vehicle, driver ducked his head down, defendant and passenger hands shaking); *State v. Frasure*, 2004 MT 242, ¶ 5, 323 Mont. 1, 97 P.3d 1101 (defendant appeared jittery and nervous, speech was accelerated and choppy, and he was sweating). Matson exhibited none of these characteristics.

Although Det. Gleich stated the reason for stopping Matson was because he appeared nervous, Det. Gleich did not state *how* Matson appeared nervous other than the vehicle jerked to get into gear and that Matson had followed all traffic laws by using his indicators, proceeding slowly, and coming to a complete stop when required. Det. Gleich did not testify that Matson’s actions were evasive, that he ducked his head, or looked as if he was trying to conceal items. This is not a case where Matson drove slowly to curiously look at a crime scene. *Gopher*, 193

Mont. 189, 194, 631 P.2d 293, 296. Matson proceeded slowly after coming to a complete stop versus an abrupt takeoff. *See, Hilgendorf*, ¶ 18 (stop not solely based on presence in high crime area or lack of other drivers in area, “but upon various additional facts, including the abrupt takeoff upon his second approach and the peculiar actions of the people inside the car while it was moving”).

The district court found that Det. Gleich’s attention to the specific property was because Gruber owned it, the owner had experienced two crimes, and Det. Gleich knew it was closed to the public. (4/15/09 Tr. at 59.) This finding is “subjective” as Det. Gleich had a personal relationship with Gruber Excavating which gave him knowledge above and beyond objective reasonableness. Objective data here includes a posted sign advertising the business and materials it sold, and an open gate allowing the public to enter the land.

In his official capacity, Det. Gleich knew Gruber Excavating had been the recent victim of two crimes, but those prior crimes were at Gruber’s other locations. (4/15/09 Tr. at 20.) Even with knowledge that Gruber Excavating had been a crime victim twice before, a high crime area by itself does not give the police particularized suspicion to stop a person. *State v. Jarman*, 1998 MT 277, ¶ 14, 291 Mont. 391, 967 P.2d 1099 (citing *Brown v. Texas*, 443 U.S. 47, 52 (1979)).

In *Jarman*, an officer responding to a report of domestic disturbance saw Jarman using a public telephone in the area where the caller

alleged her boyfriend would be walking. The area around the phone booth was known for above average criminal activity. The officer circled the block, and when he returned Jarman was gone and the phone hung down off the receiver. We concluded that “nothing in th[e] record connected Jarman to the domestic disturbance other than the fact that he was the only male Officer Korell observed in the area” and that “[b]eing in a high crime area by itself” could not establish particularized suspicion. Absent additional facts connecting Jarman to the domestic disturbance or showing Jarman was evading the officer, we concluded that “a reasonable and articulable suspicion” had not been demonstrated.

*Hilgendorf*, ¶ 17 (citing *Jarman*, ¶¶ 3-4, 11, 14-15).

In *Reynolds*, the defendant traveled down a dead-end street and the officer thought the vehicle was “bordering on traveling too fast” for the road conditions (traffic and darkness). Reynolds made a u-turn in a city park. The officer then met Reynolds at an intersection where Reynolds had the right-of-way. After approximately 7 to 10 seconds, Reynolds proceeded through the intersection. *Reynolds*, 272 Mont. at 46, 899 P.2d at 542. The officer stated Reynolds had not necessarily broken the law critically or technically. Observing no other violations of the law or driving anomalies, the Court concluded that under the totality of the circumstances the officer did not have particularized suspicion Reynolds was engaged in wrongdoing. *Reynolds*, 272 Mont. at 46, 899 P.2d at 543.

Det. Gleich needed objective knowledge to support particularized suspicion that *Matson* was involved in criminal activity. Det. Gleich did not have the required particularized suspicion. The lurching or jerking of a vehicle does not



suggest criminal activity, it suggests a clutch needs repair. (4/15/09 Tr. at 28-29.) Further, a driver obeying traffic laws is not objective data leading to particularized suspicion for an investigative stop. If this is true, there would not be enough cops to handle the traffic stops of law abiding citizens.

The district court stated the topper on Matson's pick-up prevented any view of items inside the pickup and this was articulable fact and that theft of items such as scrap metal could easily be hid in bed of closed pickup truck. (4/15/09 Tr. at 61.) The district court's finding would be true of most of the vehicles that are on the road, with the exception of motorcycles. A person driving a car could easily put scrap metal in the trunk or cabin of the car and therefore it would be hidden as well.

The district court found the Gruber Excavating yard in Clancy was not a sale yard. (4/15/09 Tr. at 61.) Although the district court gleaned this finding from Det. Gleich's testimony that it was nothing more than a material storage yard (4/15/09 Tr. at 32), this, again, is a subjective observation from Det. Gleich's *personal* dealings with Gruber. The finding is clearly erroneous because the district court ignored the posted sign, pictures of which were admitted into evidence. The sign clearly showed that the property was for business purposes (Gruber Excavating, Inc.), showed the materials for sale (granite, topsoil, manure,

and sand), and advertised Saturday deliveries. (D.C. Doc. 1, at Reply Br. in Support of Mot. to Supp. for Lack of Particularized Suspicion, Ex A.)

There is no indication Matson unlawfully trespassed at the storage yard during daylight hours. Although Det. Gleich testified the Clancy yard did not conduct sales, the general public would believe it is open for business as a sign advertising materials for sale is posted and an open gate suggests so.

Det. Gleich admitted he did not recognize the vehicle or the driver as one owned by the employee's of Gruber's. (4/15/09 Tr. at 10, 13.) However, not recognizing a person, or a particular vehicle, located in a place of business does not rise to a level of particularized suspicion to investigate whether criminal activity has been, was being, or about to be committed. *See Brown*, 443 U.S. at 52-53.

This case is similar to *Reynolds* and *Jarman* in that there is nothing beyond Matson being on a property owned by a recent victim of two crimes that rises to the level of particularized suspicion. Unlike *Hilgendorf*, Matson did not "abruptly take off" upon seeing Det. Gleich. In fact, the law enforcement officer *signaled* Matson to leave the yard. Matson did not speed away and try to evade the police, he had difficulty engaging his clutch and drove slowly and correctly and did not violate any traffic laws according to Det. Gleich. Although Matson may have been at a business beyond regular business hours, the yard was not closed (the gate was open), nor were any signs posted regarding trespassing. It is not out of place to

think that on an early summer evening a construction/landscaping business may be open for business or accept customers.<sup>1</sup> The owner testified that potential consumers dropped by the Clancy location on a weekly basis. (4/15/09 Tr. at 43-44.)

While Det. Gleich may have had reservations about the situation, he lacked particularized suspicion of wrongdoing justifying the investigative stop. Det. Gleich should have continued observing the vehicle for any objective and observable wrongdoing.

The statute and the constitutional test set forth by this Court require both objective data and a suspicion of wrongdoing. As stated by this Court, a high crime area is not in and of itself enough for particularized suspicion. *Jarman*, ¶ 14. Therefore, what is left is a vehicle jerking at take-off. It is not reasonable to suspect wrongdoing from merely observing a jerking vehicle. Indeed, if it were sufficient, Montana law enforcement officers would be justified in stopping every vehicle that has a jerky take-off. Such a result would undermine the heightened search and seizure protections of the Montana Constitution. Accordingly, Detective Gleich lacked the requisite particularized suspicion to justify a traffic

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<sup>1</sup> The sun did not set in Clancy Montana until 8:12 pm on August 29, 2008 on a “sunshiny” day. The Old Farmer’s Almanac.com, last visited February 25, 2010, <http://www.almanac.com/sun/rise/MT/Clancy/2008-08-29>.

stop of Matson's vehicle. The district court therefore erred in denying Matson's motion to suppress and this Court should reverse its ruling.

### **CONCLUSION**

This Court should reverse the district court's denial of Matson's motion to suppress as there was no particularized suspicion to support an investigative stop.

Respectfully submitted this \_\_\_\_ day of March, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Brief  
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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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LISA S. KORCHINSKI

## **APPENDIX**

Findings, Judgment and Sentence ..... Ex. A

Oral Pronouncement of Sentence ..... Ex. B